Commissioners of the State Ins. Fund v BPGL Holdings LLC
2021 NY Slip Op 32724(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 452321/2015
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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INDEX NO. 452321/2015

MOTION SEQ. NO. 003, 004, 005

COMMISSIONERS OF THE STATE INSURANCE FUND, AS ASSIGNEE OF JOSEPH ACKERMAN, ASSIGNOR,

Plaintiff,

- v -

BPGL HOLDINGS LLC and EMPORIS CORPORATION,

Defendants.

DECISION + ORDER ON MOTION

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BPGL HOLDINGS LLC,

Third-Party Plaintiff,

-against-

TRIANGLE FIRE PROTECTION CORPORATION and TRI-STAR CONSTRUCTION CORP.,

Third-Party Defendants.

Third-Party
Index No. 595517/2017

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 105, 106, 107, 125, 126, 127, 128, 140, 141, 142, 143, 144, 145, 146, 147, 156

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 129, 130, 131, 132, 137, 138, 139, 154

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 108, 109, 122, 123, 124, 133, 134, 135, 136, 148, 149, 150, 151, 152, 153, 157

were read on this motion to/for SUMMARY JUDGMENT.

Motion Sequences 003, 004, and 005 are hereby consolidated for disposition.

In this Labor Law action, third-party defendant Triangle Fire Protection Corporation ("Triangle") moves (Seq 003), pursuant to CPLR 3212, for an order dismissing third-party plaintiff BPGL Holdings, LLC ("BPGL")'s third-party complaint and all of Tri-Star's cross claims against it (Doc 56). BPGL opposes Triangle's motion in part (Doc 112). Tri-Star Construction Corp. ("Tri-Star") partially opposes Triangle's motion and cross-moves, pursuant to CPLR 3212, for an order dismissing BPGL's third-party complaint and all of Triangle's cross claims against it. Triangle and BPGL partially oppose Tri-Star's cross motion (Doc 112).

In Motion Sequence 004, BPGL moves, pursuant to CPLR 3212, for an order (1) dismissing Plaintiff's complaint; (2) granting it partial summary judgment against Triangle and Tri-Star on the first, third, and fourth causes of action[1] of its third-party complaint against them; and (3) dismissing all of Tri-Star's counterclaims. Plaintiff opposes BPGL's motion (Doc 137) and Tri-Star opposes BPGL's motion in part (Doc 116).

In Motion Sequence 005, Plaintiff moves, pursuant to CPLR 3212, for an order (1) granting it partial summary judgment against BPGL on the issue of liability, and (2) upon granting it partial summary judgment, setting this matter down for an assessment of damages. Plaintiff has withdrawn its claim against BPGL pursuant to Labor Law § 240(1) (Doc 102 at FN 1). Tri-Star, Triangle, and BPGL oppose Plaintiff's motion in part (Docs 108, 118, & 133).

I. Background

On April 26, 2013, Joseph Ackerman ("Ackerman"), a foreman employed by third-party defendant Triangle, was injured when he tripped while installing a sprinkler system ("the project") in a room on the 17th floor of the building at 1140 6th Avenue in New York ("the

[1] See infra p. 3.

premises"). Commissioners of the State Insurance Fund ("Plaintiff"), as the assignee of Ackerman, brought the instant action against BPGL, the owner of the premises, and Equity Office Management ("EOM"),[2] the building manager, to recover monies it paid Ackerman in workers' compensation benefits, asserting claims under Labor Law §§ 200, 204(1), and 241(6).

On June 27, 2017, BPGL impleaded Tri-Star, the general contractor, and Triangle, the subcontractor for the project, claiming (i) defense and contractual indemnification against Triangle; (ii) breach of contract for failure to obtain general liability insurance naming BPGL as an additional insured against Triangle; (iii) defense and contribution against Tri-Star; (iv) defense and common law indemnification against Tri-Star; (v) defense and contractual indemnification against Tri-Star; and (vi) breach of contract for failure to obtain general liability insurance naming BPGL as an additional insured against Tri-Star.

In their answers to the third-party complaint, Triangle cross-claimed against Tri-Star for contractual and common law indemnification and/or contribution and Tri-Star counterclaimed against BPGL for contractual and common law indemnification; contractual and common law contribution; and breach of contract. Tri-Star also cross-claimed against Triangle for contractual and common law indemnification, contractual and common law contribution, and breach of contract for failure to procure insurance naming Tri-Star as an additional insured.

A. EBTs

1. Ackerman

On April 26, 2013, Ackerman worked in a ten by fourteen foot room and, as he was exiting the room through a five-foot opening (the "opening"), he stepped into a "hole" on the floor with his left foot, tripped, and fell forward, hitting his head on a metal cart that was outside of the opening. The hole or indentation in the floor was to the center right of the opening, four or

[2] EOM has not appeared in this action.

five inches to the nearest side wall, and about two inches deep, two inches wide, and four inches long (the "cutout"). The floor was perforated because a hinge was going to be inserted for a door (Ackerman EBT [Doc 122] at 28:14-29:06, 31:04-19, 31:18-19, 33:15-34:02, 35:13-20, 36:02-07, 51:22-23, 52:11-13, 96:04-24). Ackerman had walked past the cutout several times earlier that day while working on the pipe cutting machine inside the room (id. at 36:13-37:03, 47:12-16, 50:19-22; 89:24-90:04).

Ackerman stated that no one "other than the owner of Triangle [gave] [him] instructions on what work was to be done at the [premises]" (id. at 23:03-07). He also stated Tri-Star's superintendent of construction, Chris Iasparro ("Iasparro"), supervised him and gave him directions during the project (id. at 24:10-23; *see also id.* at 24, 54-55, 107, 115).

2. Craig G. Ferina

At the time of the accident, Craig G. Ferina ("Ferina") was employed as a project manager for Tri-Star (Ferina EBT [Doc 64] at 8:07-9:06). Each subcontractor submitted invoices to Tri-Star based on the percentage of work it completed (id. at 38, 57). Upon receipt of such an invoice, Tri-Star contacted Iasparro to confirm the content thereof before paying the subcontractor (id. at 38, 57-58). Iasparro, who was onsite every day, was also responsible for ensuring that there were no tripping or falling hazards at the site (id. at 20:24-21:19, 23:4-14, 32:16-20). For instance, Iasparro was responsible for identifying as a site safety issue the kind of cutout that allegedly caused Ackerman to trip (id. at 43:12-19, *see also* 26:10-19, 54). "In between the time when the [cutout] [was] made, and the time the door [went] in, [it was] the practice of [Tri-Star] … to barricade[] or protect the area where the [cutout] would have been made" (id. at 26:20-27:23).

Ferina identified Tri-Star's purchase order and contract with Triangle to furnish and install new sprinkler heads with branch piping and to relocate the existing sprinkler main for the project (id. at 30:10-32:20, 35, identifying Doc 66 as the purchase order and contract). Ferina denied that there were any other accidents involving cutouts such as the hole which allegedly injured Ackerman (id. at 36, 39, 40-41).

3. Mildred Kerzner

Mildred Kerzner ("Kerzner"), an administrative assistant at Triangle, identified the complete contract between Triangle and Tri-Star for the project (Kerzner EBT at 21-22, identifying Doc 66). The contract was signed by the owner of Triangle, Gunther Richstein ("Richstein"), and by Philip Sestito, whom Kerzner identified as a Tri-Star manager (id. at 22-23).

B. Tri-Star – Triangle Subcontract

On March 15, 2013, Richstein entered into a purchase order with Tri-Star pursuant to which Triangle was to furnish and install new sprinkler heads with branch piping and relocate the existing sprinkler main for the project (Doc 66). Paragraph 5(a) of the contract required Triangle to maintain certain insurance coverage, including Comprehensive General Liability Insurance Products/Completed Operations, which was to:

> cover, among other risks, the contractual liability assumed under the indemnification provision set forth in this agreement. [Triangle] shall name [BPGL] and [Tri-Star] as additional insureds… Such coverage shall be primary to any coverage carried by [BPGL] or [Tri-Star].

(Doc 66 at 2 ¶ 5[a]).

Paragraph 5(b) of the contract provided that Triangle was to indemnify BPGL and/or Tri-Star to the fullest extent permitted by law (id. at 2 ¶ 5[b]). Specifically, it provides that:

> Compliance with the foregoing requirements as to insurance shall not relieve [Triangle] from liability under the following indemnification to the fullest extent permitted by law. [Triangle] covenants and agrees to fully defend, protect and indemnify and hold harmless [Tri-Star], [BPGL], and any other person to whom [Tri-Star] is obligated, by contract or otherwise, their employees and agents, mortgagees, and tenants, from and against each and every claim, demand, judgment, damage, liability, cost, expense or loss of any nature (including any related to personal injury, death or property loss or damage) caused by, arising from, or in any way incidental to the performance of the work hereunder, which may be asserted by subcontractor/vendor, its employees and agents or subcontractors or any third parties

(Doc 66 at 2 ¶ 5[b]).

Provision 19, and Attachment A of the contract, entitled "Special Instruction to Contractors/Vendors," gave Tri-Star's superintendent the right to issue instructions to Triangle's foreman, including instructing the subcontractor to work overtime (Doc 66, Attachment A at item VIII.G.); requiring the subcontractor to relocate his/her material and equipment (id. at item IX.A); and directing where material and equipment could be stored (id. at item IX.B.).

II. The Parties' Contentions

A. Motion Sequence 003

Triangle seeks to dismiss all claims against it, arguing that: (1) Plaintiff's claims pursuant to Labor Law §§ 200 and 241(6) against BPGL must be dismissed because (a) BPGL was not present at the jobsite, was not involved in any day-to-day work being performed and did not create the cutout or have any notice of its existence prior to Ackerman's accident and (b) 12 NYCRR § 23-1.7(e)(1), which is the only Industrial Code section alleged, is merely a reiteration of the common law standard, which is not sufficiently specific or concrete as to impute liability under Labor Law § 241(6) and, accordingly, (c) the third-party complaint against it must also be dismissed; (2) alternatively, even if this Court does not dismiss Plaintiff's claims, it must still dismiss BPGL's claims for contractual indemnification against it since a party may not be indemnified for its own negligence; (3) Tri-Star's cross claims against it for common law

negligence, indemnification, and/or contribution must be dismissed under Workers' Compensation Law § 11; (4) Tri-Star's cross claims against it for contractual indemnification must be dismissed since Tri-Star may not be indemnified for its own negligence; and (5) all claims for breach of contract for failure to procure insurance must be dismissed (Doc 56, citing Exs M & L [Redacted Insurance Policy]).

Tri-Star opposes the portion of Triangle's motion seeking dismissal of its cross claim for contractual indemnification, arguing that an issue of fact exists regarding Triangle's negligence. Tri-Star also cross-moves, pursuant to CPLR 3212, for an order dismissing BPGL's third-party complaint and all of Triangle's cross claims against it (Doc 72).

Plaintiff opposes Triangle's motion and Tri-Star's cross motion, arguing, in part, that BPGL violated Industrial Code 12 NYCRR § 23-1.7(e)(1) by failing to keep the area in which Ackerman fell free from a tripping hazard and also violated § 23-1.7(e)(2) by allowing the hole which caused Ackerman's fall (Doc 137). BPGL partially opposes Triangle's motion and Tri-Star's cross motion (Doc 112), arguing, in part, that this Court must (1) deny Triangle's motion to the extent it seeks contractual indemnification; and (2) deny Tri-Star's cross motion for common law indemnification and contribution. Triangle opposes Tri-Star's cross motion to the extent Tri-Star seeks indemnification and/or contribution from it (Doc 76).

In further support of its motion, Triangle argues, in part, that it is not liable to other parties for their own negligence (id.) In further support of its cross motion, Tri-Star argues, for the first time, that its cross claim for contractual indemnification must be granted against Triangle (Doc 78).

B. Motion Sequence 004

BPGL moves, pursuant to CPLR 3212, for an order (1) dismissing Plaintiff's complaint; (2) granting partial summary judgment against Triangle and Tri-Star on the first (contractual indemnification against Triangle), third (common law contribution against Tri-Star), and fourth (common law indemnification against Tri-Star) causes of action of its third-party complaint against them; and (3) dismissing all of Tri-Star's counterclaims.

Plaintiff opposes BPGL's motion arguing, in part, that it need only show that Tri-Star created the tripping hazard to hold BPGL liable under Labor Law § 200 (Doc 137).

Tri-Star opposes BPGL's motion to the extent BPGL seeks common law indemnification and contribution from it (Doc 116).

In further support of its motion, BPGL argues, in part, that Ackerman fell in an open area that was not defined by walls or doorways and was thus not a "passageway" as defined by § 12 NYCRR 23-1.7(e).

C. Motion Sequence 005

Plaintiff argues, in part, that BPGL is liable under Labor Law § 241(6) as predicated on § 12 NYCRR 23-1.7(e) and under Labor Law § 200.

BPGL, Tri-Star, and Triangle oppose Plaintiff's motion (Docs 108, 118, 133) arguing, in part, that (1) 12 NYCRR 23-1.7(e)(1) is inapplicable since the accident occurred in an open, and not enclosed, floor area and that 12 NYCRR 23-1.7(e)(2) is inapplicable since there is no testimony or evidence to suggest that a sharp projection contributed to Ackerman's fall; (2) there is no proof that BPGL supervised, controlled, or directed Ackerman's work; and (3) there is no proof that Tri-Star had notice of the cutout.

In further support of its motion, Plaintiff argues, in part, that there is no dispute that Tri-Star created the cutout, that Tri-Star was BPGL's agent, and that the duty to furnish a safe place to work is nondelegable when it concerns a dangerous condition on the premises.

III. The Summary Judgment Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). "This burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). The failure to make *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the showing is met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see id.* at 324).

IV. Legal Conclusions

A. Labor Law 241(6)

Labor Law § 241(6) provides, in pertinent part, as follows:

> All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> . . .
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

In order to establish a cause of action under Labor Law § 241(6) as predicated on a violation of Industrial Code 12 NYCRR 23-1.7(e), plaintiff is obligated to prove that he was injured in a passageway or working area, as defined in paragraphs (1) and (2):

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

(12 NYCRR §23-1.7[e]; *see also Canning v Barney's New York*, 289 AD2d 32, 34 [1st Dept 2001]). BPGL establishes *prima facie* that 12 NYCRR § 23-1.7(e)(2) is inapplicable to the facts of this case, and Plaintiff fails to raise an issue of fact in opposition. Ackerman does not allege that he fell due to "accumulations of dirt and debris and from scattered tools and materials and from sharp projections." Plaintiff's counsel's argument (Doc 137) that the cutout was a "sharp protrusion" within the scope of this subsection is unavailing (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 147 [1st Dept 2012]; *Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]) and is also legally insufficient to defeat summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Further, BPGL establishes *prima facie* that, based on the pleadings, the accident did not occur in a passageway under 12 NYCRR § 23-1.7(e)(1). However, Plaintiff raises issues of fact in opposition, asserting that the cutout was located in the center right of a five-foot opening that was part of a ten/fourteen-foot side-wall; Ackerman had to go through the opening to access his worksite; and given that the cutout was only a few inches away from the wall, the door was going to be installed into the opening (*see* Ackerman EBT at 28:14-29:06, 31:04-19, 31:18-19, 33:15-34:02, 35:13-20, 36:02-07, 51:22-23, 52:11-13, 96:04-24).

Given the foregoing, a factfinder could reasonably infer that the area in which Ackerman's accident occurred was being used to traverse between discrete areas as opposed to an open area under §23-1.7(e)(1) (*Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017] [explaining that "as the Industrial Code does not provide a formal definition of 'passageway,' the practical function of the area where plaintiff fell is a question to be addressed by the trier of fact"]; *McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] [finding that doorways and the areas immediately adjacent to them constitute passageways within the meaning of §23-1.7(e)(1)]). Therefore, the branch of BPGL's motion seeking to dismiss Plaintiff's claims pursuant to Labor Law § 241(6) is denied.

Plaintiff also moves for summary judgment in its favor pursuant to Labor Law § 241(6) as predicated on § 23-1.7(e)(1). However, it fails to establish its *prima facie* entitlement to such relief since, as stated above, a factfinder must determine whether 12 NYCRR §23-1(e)(1) is applicable to the facts of this case. Therefore, the branch of Plaintiff's motion seeking summary judgment pursuant to Labor Law § 241(6) is denied in all respects.

B. Common Law Negligence and Labor Law § 200

Labor Law § 200 "is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005] [internal citations omitted]). It provides, in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

(Labor Law § 200[1]).

"An owner is obligated to maintain its property in a reasonably safe condition" (*Laecca v New York Univ.*, 7 AD3d 415, 416 [1st Dept 2004]; *see also Prevost v One City Block LLC*, 155 AD3d 531, 533, 534 [1st Dept 2017]; 2A N.Y. Jur. 2d Agency § 425). "However, a party who employs an independent contractor for a particular task on the premises is generally not liable for the negligent acts of that contractor, absent a showing of a specifically imposed duty or knowledge by the principal of an inherent danger" (*Laecca*, 7 AD3d at 416 [internal citations omitted]). "Such knowledge can be imputed where the owner or principal created the hazardous condition or otherwise had actual or constructive notice of it, or where he exercised supervisory control over the contractor's operation" (id. [internal citations omitted]). "The retention of general supervisory authority over the acts of an independent contractor is generally insufficient for the imposition of such vicarious liability" (id. [internal citations omitted]). An owner or a general contractor may not be held liable under common law negligence or Labor Law § 200 for injuries arising from a dangerous condition in the absence of evidence that the owner or the general contractor actually created the dangerous condition or had actual or constructive notice of it (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]).

Here, BPGL establishes *prima facie* that it neither created the dangerous condition nor had actual or constructive notice of it, and Plaintiff fails to raise any material issues of fact regarding BPGL's liability in opposition. Additionally, there is nothing to suggest that BPGL had control or supervision over the worksite. Accordingly, the branch of BPGL's motion for summary judgment seeking to dismiss Plaintiff's claims pursuant to Labor Law § 200 is granted, and Plaintiff's motion for summary judgment pursuant to Labor Law § 200 liability as against BPGL is denied.

C. Contractual Indemnification & Contribution

The branch of BPGL's motion seeking contractual indemnification and/or contribution against Triangle is granted. It is undisputed that BPGL was not present on the premises at any time during the project and did not direct, control, or supervise any work performed in connection with the project. BPGL establishes that Ackerman's injuries were not attributable to negligence on its part and its liability is vicarious and purely statutory, and Triangle fails to raise an issue of fact in opposition (*Cuomo v. 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 (1st Dep't 2013); *Colozzo v. National Ctr. Fdtn., Inc.*, 30 AD3d 251, 252 (1st Dep't 2006); *Uva v H.R.H. Const. Corp.*, 11 Misc 3d 144(A) [1st Dept 2006]). The branch of BPGL's motion seeking to dismiss Tri-Star's counterclaims for contractual and common law indemnification, contractual and common law contribution, and breach of contract is also granted for the aforementioned reasons.

Tri-Star establishes *prima facie* that there was no contract pursuant to which it was required to indemnify BPGL, which fails to raise an issue of fact in opposition. BPGL submits the deposition testimony of Ferina testifying that "[i]n an ordinary course of business, a contract would be … signed" between an owner and a general contractor (Ferina EBT at 33:04-16). Ferina, however, was "not sure" whether there was any contract between Tri-Star and BPGL (id. at 33:17-22). The branch of Tri-Star's motion seeking the dismissal of BPGL's contractual indemnification claim against it is thus granted.

Although the branch of Tri-Star's cross motion seeking conditional indemnification against Triangle is improperly raised for the first time in its reply papers (*Rhodes v City of New York*, 88 AD3d 614, 615 [1st Dept 2011]), this Court may nevertheless grant such judgment on its own (*Fertico Belgium S.A. v Phosphate Chemicals Export Ass'n, Inc.*, 100 AD2d 165, 171

[1st Dept 1984], citing CPLR 3212[b] ["If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion"]).

A general contractor may enforce an indemnification provision against the subcontractor for that portion of damages attributable to the negligence of the subcontractor so long as the contract does not purport to indemnify the general contractor for its own negligence (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 208, 210 [2008], citing General Obligations Law §5-322.1). Here, Triangle contracted to indemnify BPGL and/or Tri-Star pursuant to a written contract (Doc 66 at 2 ¶ 5[b]). Given the "to the fullest extent permitted by law" language of the contract, Tri-Star, even if it were ultimately found to be partially responsible for the accident, would be entitled to indemnification for the percentage of any award arising not from its own negligence, but rather that of Triangle (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 627 [1st Dept 2015], citing *Brooks*, 11 NY3d at 210). Therefore, this Court awards summary judgment on this claim to Tri-Star on a conditional basis (*see DeSimone v City of New York*, 121 AD3d 420, 420 [1st Dept 2014]). Under the particular language of the indemnification agreement, Tri-Star is conditionally entitled to contractual indemnification to the extent the accident was not caused by its own negligence *(see id.*; *see also Gonzalez v G. Fazio Constr. Co., Inc.*, 176 AD3d 610, 611 [1st Dept 2019]).

Further, although Triangle establishes *prima facie* that Tri-Star's cross claims against it for contractual indemnification must be dismissed given that Tri-Star's superintendent, Iasparro, was responsible for identifying as a site safety issue the kind of cutout that allegedly caused Ackerman to trip (Ferina EBT at 43:12-19, *see also* id. at 26:20-27:23), Tri-Star raises issues of fact as to whether it created or had notice of the cutout. Therefore, the portion of Triangle's

motion for summary judgment seeking the dismissal of Tri-Star's cross claim for contractual indemnification is denied.

D. Common Law Indemnification & Contribution

Workers' Compensation Law § 11 provides, in relevant part, that:

> An employer shall not be liable for contribution or indemnification to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' . . . .

(Workers' Compensation Law §11). Here, Ackerman collected workers' compensation benefits pursuant to Triangle's policy of insurance and, thus, pursuant to Workers' Compensation Law § 11, Triangle is not liable for common law negligence, indemnification, or contribution, barring proof of a grave injury (*Flores*, 4 NY3d at 365).

The branch of Triangle's motion seeking to dismiss common law indemnification and/or contribution claims by Tri-Star and BPGL is granted since they failed to address Triangle's *prima facie* showing that Ackerman did not sustain a grave injury (*Shala v Park Regis Apt. Corp.*, 192 AD3d 607 [1st Dept 2021]; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365 [2005]).

In the case of common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021], citing *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also McCarthy v Turner Const., Inc.*, 17 NY3d 369, 370-71, 378 [2011]). BPGL establishes *prima facie* that it was not negligent and did not exercise actual supervision over Ackerman's work, and that Tri-Star was negligent and/or supervised Ackerman's work. However, Tri-Star raises an issue of

fact regarding whether it was negligent (*Pena*, 194 AD3d at 578). Therefore, the branches of BPGL's motion seeking summary judgment on the third (common law contribution) and the fourth (common law indemnification) causes of action of the third-party complaint against Tri-Star are denied. The branch of Tri-Star's motion seeking dismissal of BPGL's common law contribution and indemnification claim is also denied for the aforementioned reasons.

E. Breach of Contract

Pursuant to the Triangle – Tri-Star subcontract, Triangle was contractually required to maintain Comprehensive General Liability Insurance naming BPGL and Tri-Star as additional insureds for the project (Doc 66 at 2 ¶ 5[a]). Although Triangle submits as exhibits its insurance policy coverage demonstrating that it had some additional insureds (Docs 68 & 69), the names of the additional insured are redacted and, therefore, fail to show either BPGL or Tri-Star as the additional insured for the project and, further, Triangle does not provide any other declaration as part of its motion to meet its burden (*compare 77 Water St., Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092, 1097 [2d Dept 2017]). This Court need not consider the sufficiency of any opposing papers (*Alvarez*, 68 NY2d at 324). Accordingly, the branch of Triangle's motion seeking the dismissal of the claims by BPGL and Tri-Star for breach of contract for failure to procure insurance is denied (*Prevost*, 155 AD3d at 536).

The parties' remaining arguments are unavailing and/or need not be considered in light of the foregoing.

V. Conclusion

Accordingly, it is hereby:

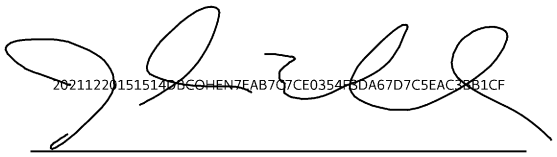
ORDERED that the motion (seq. 003) by Triangle Fire Protection is granted in part to the extent that BPGL Holdings LLC's common law contribution and indemnification claims on the

third-party complaint are dismissed against it and Tri-Star Construction Corp.'s cross claims for common law indemnification and contribution against it are dismissed; and the motion is otherwise denied; it is further,

ORDERED that Tri-Star Construction Corp.'s cross motion (seq. 003) for summary judgment seeking dismissal of BPGL Holdings LLC's third-party complaint is granted to the extent BPGL's contractual indemnification claim is dismissed against it; and Tri-Star is granted conditional contractual indemnification against Triangle Fire Protection; and the motion is otherwise denied; it is further,

ORDERED that the branch of the motion (seq. 004) by BPGL Holdings LLC seeking to dismiss Plaintiff's complaint is granted in part to the extent Plaintiff's claims pursuant to Labor Law §§ 200 and 240(1) are dismissed against it; and the branch of the motion seeking partial summary judgment on the first cause of action in its third-party complaint (contractual indemnification) against Triangle is granted; and the branch of the motion dismissing all counter claims by Tri-Star is granted; and the motion is otherwise denied, and it is further,

ORDERED that the motion (seq. 005) by Plaintiff for an order granting partial summary judgment against BPGL on the issue of liability is denied.



12/20/2021
DATE

HON. DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE